

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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IN RE: ZURN PEX PLUMBING PRODUCTS ) MDL NO. 08-1958  
LIABILITY LITIGATION ) (ADM/RLE)  
 )  
 ) Courtroom 13 West  
 ) Wed., October 14, 2009  
 ) Minneapolis, Minnesota  
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**STATUS CONFERENCE**

**-and-**

**HEARING ON**

**PLAINTIFFS' MOTION TO COMPEL  
SUPPLEMENTAL DEPOSITION OF GARY RUNYAN**

**[ DOCKET NO. 81 ]**

**-and-**

**PLAINTIFFS' MOTION TO AMEND/CORRECT COMPLAINT**

**[ DOCKET NO. 86 ]**

BEFORE THE HONORABLE ANN D. MONTGOMERY  
UNITED STATES DISTRICT JUDGE

**TIMOTHY J. WILLETTE, RDR, CRR, CBC, CCP**  
Official Court Reporter - United States District Court  
1005 United States Courthouse  
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Minneapolis, Minnesota 55415  
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1 (2:30 p.m.)

2 P R O C E E D I N G S

3 I N O P E N C O U R T

4 THE COURT: Good afternoon. Please be seated.

5 Let's see. Let's note appearances on the calendar.

6 MR. RAITER: Good afternoon, your Honor. Shawn  
7 Raiter on behalf of the plaintiffs.

8 MR. CIALKOWSKI: Good afternoon, your Honor. David  
9 Cialkowski on behalf of the plaintiffs.

10 THE COURT: All right.

11 MR. O'NEAL: Good afternoon. Jim O'Neal on behalf  
12 of the defendants, and I should introduce -- well, my partner  
13 Amy Freestone you know, and this is Bob Carlson. Bob is going  
14 to be associating in. The *pro hac* papers still need to --

15 THE COURT: Okay. A new face. Welcome.

16 Let's go off the record for just a minute here and  
17 let me change your list of agenda items.

18 (Discussion off the record)

19 I N O P E N C O U R T

20 THE COURT: Let's go back on the record. We've  
21 noted appearances and we have a proposed agenda, I think, and  
22 I don't see it on the screen, but I take it your letter of  
23 October 13th could serve as the agenda.

24 MR. RAITER: That's correct, your Honor.

25 THE COURT: All right. Expert discovery it sounds

1     like.

2                 MR. RAITER: Just to give you a background as to  
3     where we're at, we've exchanged our reports and we are now  
4     about to start expert depositions in about two weeks. In  
5     fact, we've actually conducted one already. Zurn has  
6     conducted one of our experts.

7                 We are a bit off of the schedule that you had issued  
8     as part of the Phase I order. Part of that relates to simply  
9     scheduling of the lawyers' schedules, the experts' schedules.  
10    Part of it relates to getting the remainder of the electronic  
11    production finished, which I believe I received the disk  
12    either yesterday or today that should have been the last disk.  
13    We were concerned about going to expert depositions without  
14    having everything that was going to be coming in and we didn't  
15    want anybody deposed, either our experts or theirs, without  
16    that information in our hands.

17                So, what this is going to do is dovetail into the  
18    topic that is suggested, revisions to the schedule, but the  
19    point here on the experts is that we will start in earnest  
20    depositions the last week of August. We've got them --  
21    October. We then have got them scheduled ending in the last  
22    week of November, perhaps the first week of December.  
23    Actually, we've got them ending in the first week of  
24    December right now. So, Zurn is going to take the plaintiffs'  
25    experts first, Plaintiffs will take Zurn's experts second, and

1 Jim and I have worked out a schedule that appears to work for  
2 everyone with the exception of perhaps one or two that might  
3 move around a bit.

4 The next agenda item is new cases. Since our last  
5 conference there's --

6 THE COURT: One additional, or are there two?

7 MR. RAITER: I think there were two perhaps.  
8 There's one in New Mexico called the Kolker case, K-O-L-K-E-R,  
9 one in Michigan called the Bohn case, B-O-H-N. We have other  
10 cases that are likely to be filed soon. Given where we're at  
11 in the case, I'm not sure that it is necessary or makes a  
12 bunch of difference right now, but we'll probably put some  
13 additional cases into suit within the next month or two.  
14 Those states would involve perhaps -- don't hold me to this,  
15 depending on how we make some decisions, but Pennsylvania,  
16 Massachusetts, Texas, and potentially Florida are cases that  
17 we have fairly well vetted and are likely to put in suit.

18 I know that Zurn appears to have a PowerPoint here  
19 about its report of expert discovery. I'd like to address our  
20 expert discovery just a bit and our expert reports.

21 Our primary expert is Roger Staehle. We have that  
22 in the papers that we've submitted. He's the former dean of  
23 the engineering school at the University of Minnesota. He's  
24 the former head of the mechanical engineering school at Ohio  
25 State University. He's been hired by Rexnord, which is Zurn's

1 parent company, to do work in the past. He's been hired by  
2 Mr. O'Neal in the past.

3 He has done an extensive amount of work on these  
4 fittings, more work than Zurn ever did before this litigation,  
5 more work than Zurn did in this litigation, to try to come to  
6 a conclusion about what's happening, why, and what the likely  
7 trend is going to be here. He has concluded that these are  
8 inherently defective, they will fail, they will fail  
9 prematurely, they will fail in normal, potable drinking water.  
10 We already know that because they have failed in normal,  
11 potable drinking water. He has concluded that installation  
12 doesn't matter, that water doesn't matter in terms of the  
13 inevitability of failures. That may impact how quickly they  
14 fail, how they're installed and the water chemistry certainly  
15 will impact the progress of the problem, but the fact that  
16 it's going to start and it's going to happen with yellow brass  
17 fittings is well known, well established already by the work  
18 we've done.

19 One of the most striking findings here and one that  
20 Zurn has not rebutted nor will it ever rebut is that we took  
21 fittings right out of the bag. Bought them at Home Depot,  
22 took them out of the bag, sectioned them, put them under a  
23 microscope and they were cracked. They were already sitting  
24 there ready to fail. Once they were installed the cracking  
25 would then continue and progress to complete failure. Their

1 experts don't even touch that opinion. They don't even touch  
2 that fact. They ignore it. They have to, because these  
3 fittings are not properly designed and manufactured and they  
4 are inevitably going to fail. That is why Zurn stopped  
5 selling them in Minnesota. That's why it's been converting  
6 all of its business to plastic throughout the country and will  
7 do so completely very soon. That's why other manufacturers  
8 have withdrawn these fittings from the market. That's why  
9 Mr. Carlson's firm down in Nevada has sued Rehau, another  
10 brass pex manufacturer on behalf of Pulte Homes, because these  
11 fittings with yellow brass are inherently defective.

12 Now, the defense and what Ms. Freestone is going to  
13 talk about is claim rate. Well, the claim rate we have is  
14 low. We've got a lot of these fittings in the field and we  
15 don't have that many claims. There are reasons for that.

16 The experts who know about these things know that  
17 claim rate does not equal failure rate. That's Warranty and  
18 Reliability 101. Claim rate does not equal failure rate.

19 What we know about the claim rate is that it is  
20 impacted by Zurn's own conduct. We know that the evidence in  
21 the case is undisputed that Zurn has been telling people to  
22 make insurance claims first, to not make Zurn warranty claims.  
23 We know that it has also been denying claims, and at some  
24 point plumbers stop making claims once you've had enough  
25 denied. That's deposition testimony in the case. One of

1     these plumbers who's been deposed said: I had a couple  
2     hundred of these fail that I didn't even submit to you because  
3     I knew it was useless. So, when you hear about claim rate, it  
4     does not equal reliability of the product, it does not equal  
5     failure rate, and we're going to have a big expert fight about  
6     that and we'll take depositions.

7             But the other thing they do is, they talk about the  
8     250 million fittings out in the field. Those are fittings  
9     that they sold. We don't know if they've been installed. We  
10    don't know if they've been installed in radiant heat systems,  
11    which they are used for. We don't know if they've been used  
12    in boats and RVs, which they are used for. Those products are  
13    not at issue in our case. We're talking about real property  
14    here. So the 250 million has to be backed down. We don't  
15    know how many are sitting in inventory. We don't know how  
16    many just have never been installed for whatever reason.

17            But if you back that number down, what you have to  
18    keep in mind is that an average home has about 40, 50, 60 of  
19    these fittings per home, so it isn't 250 million homes that  
20    these are in. It's really four or five million perhaps.

21            And then if you want to look at claim rate on that  
22    number, the numbers look differently. And we'll have issues  
23    with their experts and what they've done, but our expert,  
24    Dr. Wallace Blischke, who is a reliability expert, not a  
25    statistician which Dr. Wecker is that Zurn has retained here,



1     which means he looks at how reliable are products, can we  
2     predict the failure rates, can we predict their reliability,  
3     he ran calculations here using the claim rate, not the failure  
4     rate, but the actual claim rate here. And he said: All  
5     right. Let's take their claim rate. If we look at that and  
6     we use normal and accepted statistical practices and processes  
7     and we run these numbers, what will we see with these fittings  
8     over time. He concludes that over 98 percent of systems with  
9     these products will fail within the 25-year warranted period.  
10    That's using their own data.

11           Their expert Dr. Wecker, who Ms. Freestone's going  
12    to talk about here today, never makes such a calculation. And  
13    he talks a lot -- and when we talk about this motion for Gary  
14    Runyan, we can talk about some of his shortcomings in his  
15    approach, but he doesn't do a reliability analysis. What he  
16    does is a claim rate analysis, which is completely irrelevant,  
17    has nothing to do with how this product is going to perform in  
18    the future. It's not an accepted methodology. We'll prove  
19    that later on in the case.

20           An analogy for the approach that they've taken is,  
21    well, if it hasn't failed yet, it won't fail tomorrow. That  
22    would be an analogy that somebody could have tried to apply to  
23    that bridge on 35W. It didn't fail in 40 years. It's not  
24    going to fail tomorrow. That proved to be terribly wrong.  
25    And what we've seen with this process and these products is

1     that the failure rate already coming in as a claim rate is  
2     showing us trends that look very much like other products that  
3     have had significant problems and ultimately have been  
4     recalled or completely withdrawn from the market. So we're  
5     very comfortable with where we are on our expert work.

6             The experts also concluded, as did one of their own  
7     experts, that there's nothing in the water of the class  
8     representatives that stands out as being a cause for the  
9     stress corrosion cracking. Dr. Korshin, who is their expert,  
10    says very clearly -- excuse me. Dr. Beavers, who is their  
11    expert, says very clearly that there was nothing in the water  
12    sampled at the Minnesota class representative homes that was  
13    in any way an indicator for a stress corrosion cracking  
14    problem. Our people agree with that. The water is very  
15    normal, very expected potable water, all within EPA limits.  
16    All calculations, all readings were exactly where you'd expect  
17    to find them within EPA limits.

18            We also tested some fittings in the lab in various  
19    waters. We actually tested actual Zurn fittings. We took  
20    sections of them, we put them under the simulated stress that  
21    they're under because of installation of these fittings, and  
22    they too cracked in water that was very normal, very expected.

23            So, ultimately when we get to the end of this  
24    there's going to be a dispute. On the one hand there's going  
25    to be an argument about claim rate. We don't have that many

1 claims; therefore, we don't have that many problems. On our  
2 side of the ledger we're going to have science and testing and  
3 very, very thorough, very, very complicated, but very clear  
4 testing that shows that this was a bad idea. They should have  
5 never used yellow brass for this system.

6 So that's the status of the plaintiffs' report.  
7 I'll turn the podium over to Ms. Freestone at this point.

8 THE COURT: All right, or Mr. O'Neal.

9 MR. O'NEAL: I'm sorry. I'm disappointing you,  
10 because it's going to be me instead of Ms. Freestone.

11 MR. RAITER: I'm sorry.

12 MR. O'NEAL: I'm actually kind of disappointed  
13 Mr. Raiter didn't have a PowerPoint. Every other time we've  
14 been here he's had one and I haven't.

15 THE COURT: So you came with one today?

16 MR. O'NEAL: I'm filling in the breach.

17 THE COURT: All right.

18 MR. O'NEAL: And this is a preview of the expert  
19 fights which are coming up.

20 THE COURT: All right.

21 MR. O'NEAL: And I think that it's important to  
22 point out that as you approach the next big issue in this  
23 case, which is class certification, you don't necessarily need  
24 to resolve these expert disputes as a finder of fact. What  
25 you need to do is analyze what the issues in the case are and

1     how they may fairly be litigated as a class or not, and so  
2     that's just kind of a different perspective as you listen to  
3     the expert dispute here.

4             And I don't normally try to give previews of these  
5     things, but this is pretty complicated stuff and I think it  
6     might help -- Mr. Raiter's been doing it. I think it might  
7     help if we do give you a little preview.

8             THE COURT: Okay.

9             MR. O'NEAL: We have produced six experts. Not  
10    surprisingly, I disagree with a number of the things that  
11    Mr. Raiter said, in particular regarding the amount of work  
12    that has been done, but I think you'll see that both sides  
13    have done quite a lot of work and quite a lot of testing.

14            We have three metallurgists that we've identified, a  
15    statistician, a water chemistry expert, a professor from the  
16    University of Washington who's quite nationally known in the  
17    field, and a plumber who is also a mechanical engineer who  
18    writes regularly on plumbing issues and grew up in the trade  
19    and knows a lot about it.

20            The PowerPoint is basically a summary -- or excerpts  
21    from some of these expert reports which total well in excess  
22    of a hundred pages on our side and so it's only a brief  
23    snapshot.

24            The first picture is simply a reminder of the  
25    fittings. I don't know if you still wear the necklace, but --

1           THE COURT: Well, I'm going to Palm Beach to the MDL  
2 thing, so I did dig it out of my jewelry drawer.

3           MR. O'NEAL: All right. Very good. Well, one of  
4 those probably looks like your necklace --

5           THE COURT: It'll get its annual wearing.

6           MR. O'NEAL: But while there are a variety of  
7 designs here, the principal ones at issue because they are by  
8 far the most common of the fittings in use in the field are  
9 the Ts and the elbows, so most of these Ts and then you see an  
10 example of an elbow with the crimp rings on it in the upper  
11 left-hand corner.

12           One note of interest about that picture is that each  
13 one is from a different supplier. The machined one looks a  
14 little different in the lower left-hand corner. That actually  
15 came from Zurn in Plano, Texas, which machined its own brass  
16 fittings up till around 2000 or so. Since then they've used  
17 five different suppliers, one in Italy, two in China, two in  
18 Korea, to manufacture the fittings for them.

19           We are going to be talking a lot about failure  
20 rates. That indeed is what this case is about. And in  
21 looking at the real world, not -- you know, each side has  
22 hired a statistician who has come up with certain opinions,  
23 but if you look at the real world data, what we have are the  
24 number of claims that have been reported to us, and Mr. Raiter  
25 in his effort on the Internet and otherwise and he his fellow

1 plaintiffs attorneys have gathered some number of claims and  
2 they've provided us some information about that. It is not  
3 perfect data and in every case like this you get into disputes  
4 about are you counting this or are you counting that. Those  
5 disputes are important where the issue is anywhere close, but  
6 as we'll see in a minute, it ain't anywhere close here and you  
7 can knock 50, 60, 70 million off our number of fittings sold  
8 to account for the radiant heating and the fittings never used  
9 and you've still got tiny failure rates compared to the normal  
10 expectations.

11 This just simply is to show all plumbing products  
12 have some number of failures due to corrosion, all metal  
13 plumbing products. And I'll tell you, this case would make me  
14 nervous a little bit about getting into the plumbing business  
15 in a big way, because you sell product all over the country.  
16 Every metal that you use has some propensity to corrode.  
17 Domestic water is by far not a uniform substance. Everywhere  
18 you go, even with private wells in the same community, water  
19 can have very different chemistries, and as we'll see in a  
20 second, Minnesota has been by far the leader in terms of  
21 number of claimed failures in this litigation. Northern  
22 Minnesota, in particular the area around Alexandria and  
23 Detroit Lakes, has been by far the most. We've had very few  
24 claims in the Twin Cities area. So, to suggest that all of  
25 these things are going to fail, even if you say they're going

1 to fail a little faster in some waters than others, but if you  
2 say they fail in all domestic water, it really does not  
3 explain the huge differential in location nor the very tiny  
4 claim rate. Professor Staehle that Mr. Raiter talked about  
5 says that after ten years the failures will be massive. Well,  
6 these fittings have been on the market for 11 years and we  
7 haven't had massive failures of these things.

8           This is what I was referring to when I said that we  
9 have this clumping that I've talked about. What I did, we  
10 have a slide that visually didn't come across very well that's  
11 in the report of ESI, one of our experts, that gives failure  
12 rate based on an analysis of the Zurn claim data, and we  
13 come -- using the sales figures in the printouts, we see that  
14 between late 1998 and the end of 2008, we have over 265  
15 million fittings sold. We have claimed failed fittings of  
16 1583. So radiant heating is perhaps five to ten percent of  
17 the business. We don't know how many were not used, but if we  
18 say 200 million is a fair estimate of how many fittings are  
19 likely out there, we still have an overall failure rate --  
20 claim rate of something like one thousandth of one percent.  
21 And whatever Mr. Raiter may say about, well, there were  
22 failures we don't know about, I'm sure there are, but we don't  
23 know about them. Whatever he may say about what Zurn did or  
24 whatever, whatever, these numbers are not close if you're  
25 talking an overall, uniform defect, which is what the

1 plaintiffs will want to characterize this as for class  
2 certification purposes.

3 Then the table from the ESI report actually lists  
4 the data for all 50 states. It may have been Dr. Wecker's  
5 report, come to think of it. I'm not sure which.

6 I just took the ten states so far involved in cases  
7 in this litigation. There are a number of states where  
8 there's basically a zero claim rate, but you see the huge  
9 difference between Minnesota and all other states whether  
10 you're looking at the number of claims or the number of  
11 claimed failed fittings. It's something like 40 percent of  
12 the claimed failed fittings, while Minnesota is a little under  
13 two percent of the fittings sold.

14 Now, again, we can criticize the data. We can say,  
15 well, the fact that it shows as being sold in Minnesota  
16 doesn't necessarily mean it was used in Minnesota. We can  
17 make all kinds of those kinds of criticisms, but this is the  
18 real data that we have. It's not speculation.

19 We also received from Mr. Raiter and the plaintiffs  
20 a listing of claims they knew about. For reasons that are  
21 kind a long story we didn't get the names of the claimants,  
22 just as they don't have the names in our database, but -- so  
23 we're limited in our ability to say how many of the claims  
24 they produced are claims we already knew about. We don't know  
25 what the overlap is. But on that list were 981 claims. 577



1 of them were from Minnesota, so an even higher disparity with  
2 respect to Minnesota claims. And again, those claims don't  
3 tend to be from Minneapolis, which has surface water. They  
4 tend to be from groundwater systems typically -- not  
5 universally, but typically around Alexandria, Detroit Lakes,  
6 and then kind of in a sickle going down into the southwest.

7 The next slide is a table from our expert work by  
8 Dr. Wecker, the statistician. This data is quite limited  
9 because we don't know for most of the claims what the date of  
10 installation was, we don't necessarily know the date of  
11 failure in all cases. Where we were able -- and we don't  
12 always know the date of manufacture, but where we were able to  
13 do it, we tried to look at whether there is any indication  
14 that the claim rate is either increasing as the fittings get  
15 older, which the plaintiffs have to say if they're going to  
16 persuade anyone of this theory of massive failure of the  
17 250 million fittings, or is the claim rate going to decline or  
18 stay the same. Based on this work it looks like there tends  
19 to be a drop-off after three years of installation, which our  
20 experts will say is not surprising given that if the  
21 environment and the installation stresses are such that it's  
22 going to cause stress corrosion cracking, it may -- it's  
23 likely to do it in the first two or three years, but if the  
24 environment and the installation stresses are such that it'll  
25 last three, four years, then probably it's going to be okay.

1           The next slide is simply the classic Venn diagram  
2       used for years to explain stress corrosion cracking.  
3       Dr. Staehle actually has a more complex version of this which  
4       I'm going to be asking him about, which I think actually is of  
5       considerable help to the defense here.

6           But the point here is that what stress corrosion  
7       cracking is is environment-induced cracking of metals. That  
8       actually was the title of a symposium that Dr. Staehle  
9       appeared at. And so it is not something that's like in a  
10      metal handbook where they give you the strengths based upon it  
11      being in a dry, inert environment. This is a function of the  
12      complex atomistic interaction between and among the  
13      material -- and certainly any brass alloy is potentially  
14      susceptible to stress corrosion cracking, as is copper and a  
15      lot of other things -- the material, the stresses either from  
16      manufacturing or from installation and the environment, in  
17      this case the water, which varies hugely around the country.

18           Now, it seems to us that from the standpoint of  
19      class certification, this is kind of the opposite of  
20      uniformity. This is something where you have to look -- and  
21      it's a very complicated analysis -- and say, well, what  
22      happened in this particular case. Did the plumber mess up?

23           By the way, the next couple of slides show -- and  
24      there aren't many of them -- the vast majority of the failures  
25      that have been reported and that the plaintiffs and us have

1       been put into a fitting depository were stress corrosion  
2       cracking, but some of them are mechanical abuse, such as these  
3       pictures where someone simply put physical stress --

4               THE COURT:   Wrenched them off, yes.

5               MR. O'NEAL:   Some of them are erosion corrosion,  
6       which is not at issue in this case, and so you kind of need to  
7       have a little mini-trial just to make sure that any particular  
8       fitting was stress corrosion cracking rather than something  
9       else.

10              But in any event, we do have indications that there  
11      are installation errors of quite common nature.  If you look  
12      at this Table 4 from another one of our expert reports, as we  
13      look at the failed fittings that are in the depository, over  
14      half of them, 51 percent, had the fitting butted up too  
15      close -- or the crimp ring butted up too close to the fitting  
16      shoulder, which our experts will say has some additive effect  
17      on the stresses.

18              We are not able in most cases to know whether there  
19      were adequate supports.  The directions in the installation  
20      manuals say to use straps or hangers every 36 inches to  
21      support long pipe runs so they're not sagging.  We know from  
22      inspecting some of the plaintiffs' homes that this was not  
23      always done.  We can't know in some instances because we don't  
24      have enough of the equipment and we never looked at the site,  
25      but that is another instance where poor installation practices

1 by plumbers can have some effect. We're not going to say  
2 it's, you know, the sole explanation, it's much too  
3 complicated an issue for that, but it can have an impact, and  
4 where it has an impact, we ought to be able to turn around and  
5 say, "Mr. Plumber, this is at least partly your problem  
6 because you didn't follow our instructions."

7 With the water there were all kinds of issues.  
8 Minnesota, I was told by somebody at the Department of Health  
9 -- and it's in Professor Korshin's report -- has I believe the  
10 highest number of municipalities in the country who are not  
11 able to meet the requirements of what's called the lead/copper  
12 rule that the EPA imposes, and that means that too many of our  
13 municipalities around the state have very corrosive water  
14 which -- if you have a copper system, it takes the lead and  
15 copper out of the piping. And as a result, the Minnesota  
16 Department of Health has published *Phosphates Are Necessary*.  
17 *Phosphate Or Bust* was the name of one of their publications,  
18 because phosphates are put into the water to increase  
19 corrosion resistance. And there's going to be a big expert  
20 fight about phosphates and whether those issues apply only to  
21 general corrosion or do they apply to stress corrosion  
22 cracking as well, but that is a dispute in this case. And one  
23 is searching to explain why Minnesota is so much worse, so  
24 much different, why untreated wells in northern Minnesota are  
25 so much worse, so much different. Water softeners combined

1 with untreated wells seem to be a problem, yet we don't see  
2 water softeners being sued for not warning people about  
3 corrosion. So it is very complex, it is very individualized,  
4 and these are the scientific disputes which we believe render  
5 this case really insusceptible to class certification.

6 That's really what I wanted to give you as a preview  
7 of where we believe the expert reports go.

8 THE COURT: Coming attractions. All right. Thank  
9 you. I guess that gets us to the item with regard to  
10 suggested revisions to the schedule.

11 MR. RAITER: Yeah. A couple of things I can't  
12 resist, your Honor.

13 Again, failure rate --

14 THE COURT: You didn't agree with everything he  
15 said?

16 MR. RAITER: Well, some of it is just not supported  
17 by even what the experts that they've retained say.

18 None of their experts say installation caused any of  
19 these failures. None of their experts say that the  
20 installation caused failures at the plaintiffs' homes, the  
21 class representatives. It's all a big side show, because they  
22 know that when they go to the scientific evidence it was a bad  
23 idea.

24 Fundamentally, these fittings will fail in pure  
25 water, pure water. You don't have to put anything else in the

1 water. You put them under stress with this type of brass,  
2 they fail. That literature was there for more than 40 years  
3 before they started selling these products. It was simply a  
4 bad idea, because they didn't have a metallurgist on staff,  
5 they didn't do any testing, they didn't do any analysis. So  
6 you can talk about installation, you can talk about variation  
7 in water, but when the fundamental issue is they can't perform  
8 in any water, that's the problem. And we'll talk about claim  
9 rate and failure rate and statistically you can manipulate all  
10 this data and it's very imperfect data, which is why you can't  
11 rely on it for what they're relying on, which is somehow claim  
12 rate equals failure rate.

13 THE COURT: I'm not going to get to resolving those.  
14 I view this as sort of alerting me to -- heads up to issues  
15 down the road --

16 MR. RAITER: I could talk about this for hours.

17 THE COURT: I can tell. I think you both can.

18 MR. RAITER: All right. Suggested revisions to the  
19 schedule.

20 As already indicated, we're off schedule.

21 THE COURT: By how much?

22 MR. RAITER: By about a month.

23 THE COURT: Oh, that's not too bad.

24 MR. RAITER: We would have had our class  
25 certification hearing due under our current schedule by

1 December 30. That in and of itself maybe poses some problems  
2 for everyone in the first place, just holidays and whatnot.  
3 Jim and I talked about whether we should talk with Gertie  
4 about getting a new date either the end of January or early  
5 February, but before we did that we needed to get some input  
6 from you, we thought, or at least I thought, about how you  
7 view the certification of this case. When we have the  
8 hearing, how much time are you going to give us? Do you  
9 contemplate wanting live testimony from these experts? Some  
10 judges do. So when we talk to Gertie about getting a date,  
11 we'll need to know how much time you need to have available to  
12 handle this. Often these hearings last several hours, maybe  
13 half a day, morning or afternoon. Sometimes the Court says,  
14 "You know, I really would like to hear from these  
15 metallurgists. I'd like to hear from them live. I'd like to  
16 ask them questions. I'd like to hear them explain their  
17 opinions." We'd be perfectly willing to do that on the  
18 plaintiffs' side of the case.

19 So that's an issue and Jim can certainly address  
20 what he thinks we need, but we certainly need to hear from you  
21 before we reschedule this hearing.

22 THE COURT: All right.

23 I'm interested in Mr. O'Neal's position as to  
24 whether you think live testimony at the certification hearing  
25 would be appropriate.

1           MR. O'NEAL: We're happy to do it. I guess it's a  
2           little difficult given the number of experts. I mean, if we  
3           brought them all in, we'd basically have a week-long trial,  
4           but I'm happy to do whatever the Court thinks would be useful.  
5           I think if we have a real evidentiary hearing where each of us  
6           would present what we want presented, then we're probably  
7           talking at least three or four days, half a day if we do it on  
8           the record -- on the written record and argument, but I'm  
9           happy to go either way.

10          THE COURT: Well, I suppose an alternative might be  
11          to have a couple-day hearing and put you both sort of on a  
12          clock with regard to how much expert testimony you can  
13          produce.

14          MR. O'NEAL: We're also going to be videotaping the  
15          expert depositions, which is another possibility, I suppose.

16          THE COURT: I could maybe have a highlight film of  
17          the video deposition. I mean, I wouldn't necessarily have to  
18          hear the whole deposition. You could work on that.

19          MR. O'NEAL: Have another lawsuit with the Zimmerman  
20          Reed folks about highlight films.

21          (Laughter)

22          THE COURT: There you go. Well, I have certified  
23          several classes in the course of my career and I've so far  
24          done it only based on written submissions, which doesn't mean  
25          that it's the right way to do it or that it wouldn't be



1 helpful to have some live testimony and sometimes it is  
2 helpful for me to be able to ask some questions and figure out  
3 where the experts are.

4 I guess my thought on this is that we should relax  
5 the scheduling, the current scheduling order, by 30 days or 60  
6 days perhaps so that we aren't against a wall on this, because  
7 I think things are proceeding along and the other issue we  
8 discussed this morning may cause some delays too. So my  
9 thought is to have you see if you can agree to a revised  
10 scheduling order and my thoughts are to move everything back  
11 by 30 to 60 days.

12 Then with regard to the certification hearing, I  
13 think that should be in the early part of next year, probably  
14 February, March, something in that area, and I guess what I'd  
15 like you to do is make some -- talk and see if you can agree  
16 to some method of doing it. I guess my thought is that I  
17 probably would not want to give you more than two full days of  
18 testimony-type hearing. I mean, I don't want a mini-trial on  
19 and be spending four or five days on a certification hearing,  
20 but my thought is to give you up to two days and you can  
21 divide up your time or I can set the time, but if you get  
22 together on how to best present your evidence, some portions  
23 of it written, some by video, some by live, I guess I'm  
24 amenable to most anything with the thought that it would be  
25 basically two days of hearing time sometime, I would suggest,

1 in February.

2 Does that answer the scope of the certification  
3 hearing?

4 MR. RAITER: I think it does. That was the nature  
5 of the agenda item.

6 THE COURT: That's what I sort of envision that  
7 might work. I could be persuaded otherwise if someone were to  
8 make an argument, but that's sort of my off-the-top-of-my-head  
9 thought of what might work in this case.

10 MR. RAITER: Thank you. Jim and I will confer then  
11 and get back to you with a proposal on the scope of the  
12 hearing, and then as we do that, we'll work with your staff to  
13 schedule it.

14 THE COURT: Yes, and I'll talk to Gertie about that  
15 and tell her to keep a couple dates in mind. Does February  
16 sound like the right month?

17 MR. O'NEAL: It does to me, your Honor. That's  
18 actually what I was going to propose.

19 MR. RAITER: Yeah, I think early February maybe,  
20 mid-February would make sense.

21 THE COURT: All right. Right after the hearing  
22 we'll set aside a couple target dates and try to hold a couple  
23 dates.

24 MR. RAITER: If we were doing it mid-February, then  
25 our initial briefing would be due January 1st or so, so I

1     suppose if we just get outside of that February 15 time  
2     frame --

3             THE COURT:   Why don't I tell you that we'll set  
4     aside two dates between February 15th and the end of February.

5             MR. RAITER:   That would be perfect.

6             THE COURT:   Then I'll have her notify you what those  
7     two dates are.

8             MR. RAITER:   Then everybody avoids the holidays for  
9     briefing and other things.

10            THE COURT:   Right.

11            All right.   The next item is submission of proposed  
12     amended complaint for Minnesota actions, and that's the matter  
13     we talked about earlier.  Is this -- oh, no.  This is the  
14     combination of the Minnesota --

15            MR. RAITER:   This is different.  Jim and I had  
16     spoken about consolidating the four -- excuse me -- the three  
17     Minnesota cases for a single proceeding, consolidating into an  
18     amended complaint so that we have the Cox case, the Oelfke  
19     case and the Minnerath case all in one pleading and complaint  
20     that we will then be briefing the certification from, and then  
21     also after certification is decided those cases would remain  
22     consolidated for all purposes.

23            THE COURT:   Okay.

24            MR. RAITER:   Including trial.

25            THE COURT:   That's agreed to?

1 MR. O'NEAL: Yes.

2 THE COURT: Okay.

3 MR. RAITER: And we had worked on a stipulation to  
4 submit to your Honor to accomplish that. I believe the last  
5 set of revisions resides with me and I need to get the final  
6 revisions made to the amended complaint as well and get those  
7 to Jim. We don't intend to alter anything substantively. All  
8 we'll do is add the allegations about the Minneraths and  
9 Ms. Oelfke into the Cox complaint essentially. We will not be  
10 altering any of the allegations or the counts or causes of  
11 action in any other way. But once we do that we'll then  
12 submit it to the Court. I don't believe that we would need to  
13 have any hearing on it unless you have some issues or  
14 questions.

15 THE COURT: I'll take a look at it when it comes in,  
16 but I would anticipate I don't --

17 MR. O'NEAL: May I ask something?

18 THE COURT: Sure.

19 MR. O'NEAL: When you say "into the Cox complaint,"  
20 the Cox complaint is currently as a national class pled and  
21 regional class is pled in the alternative. My understanding  
22 is that that was changing.

23 MR. RAITER: I think for purposes of the complaint  
24 we'll continue to include those different class definitions,  
25 but when we move for class certification, we've already told

1 Jim and Zurn, as we were required to by your prior order, that  
2 we will be moving and seeking certification only for a  
3 Minnesota class, a statewide class.

4 THE COURT: All right.

5 MR. O'NEAL: I'm not sure what happens to the  
6 national and regional if class cert is denied as a statewide  
7 class. It seems unusual.

8 MR. RAITER: Well, I don't know what would happen to  
9 it, but that was our intent, was to go forward and simply say  
10 -- as you can always do in a complaint, you can seek  
11 certification of one count and leave the others there for  
12 future purposes. If the case doesn't proceed and the class  
13 for some reason is not granted, I don't know what having it in  
14 the complaint matters as we proceed.

15 MR. O'NEAL: Well, I'll look at the proposed  
16 complaint.

17 THE COURT: Yes. Then you're kind of back to square  
18 one.

19 MR. RAITER: Yeah. I mean, our idea is that we're  
20 moving on a Minnesota statewide basis in Phase I and only a  
21 Minnesota statewide basis, and from there we'll see what  
22 happens and decide what to do in Phase II.

23 At some point we will need to talk with the Court  
24 about what Phase II is and perhaps this is premature until we  
25 have a ruling on certification, but on the other hand, I don't

1 know that we want to wait six months to start thinking about  
2 what this case looks like regardless of whether the case is  
3 certified. At some point even without a certification you  
4 have people who have claims that need to be adjudicated either  
5 by trial or otherwise either in a class setting or an  
6 individual setting. So I think Mr. O'Neal and I should confer  
7 more, but at some point, at least from the plaintiffs'  
8 perspective, we're going to be wanting to suggest something to  
9 the Court about what Phase II looks like.

10 THE COURT: Okay. The next item, at least on my  
11 agenda, is the motion to amend the complaint in Breaux, I  
12 assume is how we pronounce it. That's the Louisiana case we  
13 discussed off the record, and as I indicated, it's my  
14 intention to hold that matter under advisement, and I suppose  
15 we should put a timetable on that. Why don't I just hold that  
16 until -- let's see. This is -- end of next week? Does that  
17 give you enough time or do you need longer than that?

18 MR. RAITER: I believe that's probably fine on our  
19 end.

20 THE COURT: Well, actually, I'm going to be at the  
21 MDL conference the first part of next week, so I wouldn't be  
22 doing anything with it anyway. But if you can let me know by  
23 the end of the month, by October 30th, let's say, as to  
24 whether you wish me to rule on the unopposed motion. I'll  
25 rule on it as soon as I hear from you, and my thought is I

1       probably should just go ahead and it may be that other events  
2       will change the future, but I'll give you a chance to see and  
3       talk that over before I rule on it.

4               MR. O'NEAL: Can I ask, can we see the proposed  
5       amended complaint for Minnesota by that time too?

6               MR. RAITER: Oh, sure. You'll have it before that.

7               THE COURT: All right. And the last thing is this  
8       motion regarding the Runyan deposition which seemed to me  
9       pretty thoroughly briefed. Do we need oral argument on that?

10              MR. RAITER: The only point that I'd like to make  
11       orally is the suggestion by Zurn that we take Wecker's  
12       deposition first and then see whether we need Runyan's  
13       deposition leaves me in the position of not having the  
14       information available to cross-examine Wecker. When you take  
15       an expert deposition, you usually do it one of two ways. You  
16       either produce the expert's file before that deposition, or  
17       you produce the expert's file at the deposition so that  
18       counsel has the ability to review the file and the information  
19       relied upon or considered --

20              THE COURT: One of the other arguments in your brief  
21       related to how it affected the class certification time, and  
22       obviously with some relaxation in that time that issue is kind  
23       of gone.

24              MR. RAITER: I think you're exactly right. About  
25       whether we could get it completed in time is now moot given

1 the fact that we're going to change the schedule.

2 So, our fundamental basis is he considered it, he  
3 put it in a very prominent place in his report, and we believe  
4 under the Turnpike case and under Rule 26 we're simply  
5 entitled to inquire and to get the actual information. And  
6 while we could certainly ask him what he was told, the case  
7 law in Turnpike in particular indicates that we should also be  
8 able to ask Mr. Runyan what he said and inquire of Mr. Runyan  
9 a bit about the basis for the statement. It plays a very,  
10 very prominent role in Wecker's report. He really doesn't  
11 offer many opinions other than Dr. Blischke was wrong in  
12 concluding that it was a 40-year mean time to failure.

13 THE COURT: But he does speak in terms that he was  
14 -- I think his word was "verifying" or "validating" by  
15 basically bouncing it off Runyan.

16 MR. RAITER: And if he did, again, under Rule 26  
17 it's something he considered and it's something that we're  
18 entitled to explore, and what we've proposed is a very short  
19 deposition in the scope of this case that's not at all  
20 burdensome or expensive to go down to Dallas for two hours and  
21 take his --

22 THE COURT: Can you do it on the phone?

23 MR. RAITER: If your Honor ordered me to, I could.  
24 I'd rather not, but if I had to, I could.

25 THE COURT: I understand.



1           MR. RAITER: But the issue simply is, in terms of  
2 the progression of it, if I have to go take Wecker first and  
3 then I go take Runyan, I don't have the opportunity to ask  
4 Wecker about what Runyan said, so I'd like to have Runyan and  
5 what he says ahead of time so that I can then inquire of  
6 Wecker --

7           THE COURT: Tell me when Wecker is. In November  
8 sometime, right?

9           MR. RAITER: I don't remember the date.

10          MR. O'NEAL: First week of December.

11          THE COURT: First week of December.

12          MR. RAITER: So we have six weeks almost to knock  
13 that out. It shouldn't be a problem schedule-wise.

14          Other than that, your Honor, nothing to add.

15          THE COURT: All right.

16          MR. O'NEAL: And I think we made our points in our  
17 brief. I'll just add that I'm particularly concerned at the  
18 suggestion that by telephone is not enough, because I listened  
19 to this conversation, it was five minutes or less, and why we  
20 have to fly to Dallas suggests to me that there's going to be  
21 a lot broader inquiry into I don't know what, the erosion  
22 corrosion test that was done that they already had at the last  
23 deposition. I don't want to be in the position of putting too  
24 many fences around what can be said, but this guy's been  
25 deposed for two full days and I just don't see the --

1 THE COURT: A lot of deposition.

2 MR. RAITER: My only issue about doing it by  
3 telephone is it's difficult to deal with exhibits if you need  
4 to mark things that aren't premarked and he doesn't have them  
5 in front of him. It's just a little cumbersome.

6 THE COURT: It's a pretty narrow issue, though. I'm  
7 not sure this is what the choice will come down to, but I'm  
8 interested, Mr. Raiter, in your responding to: Given your  
9 druthers -- and I get this may not be the choice -- would a  
10 phone deposition with Runyan be preferable -- which would  
11 occur prior to the Wecker deposition -- would that be  
12 preferable to an in-person interview, short deposition after?  
13 I mean, you're saying you want that information to confront  
14 the expert with.

15 MR. RAITER: I believe it would be preferable to  
16 have it before, and if that had to be by telephone --

17 THE COURT: Even if it had to be by phone.

18 MR. RAITER: Yes. I'd take it by telephone if I had  
19 to.

20 THE COURT: All right.

21 Did you want to weigh in on that question?

22 MR. O'NEAL: No.

23 THE COURT: Okay. We will try to get you something  
24 out on that. I don't see any reason that the resolution of  
25 that issue has to await the resolution of the status of the

1 amended complaint, do either of you think? I'll just rule on  
2 that. I don't think -- I think it's independent of the other  
3 issues I've raised and I will await -- I'll hold the two days  
4 for you in the end of February and have Gertie notify you as  
5 to what those dates are.

6 MR. O'NEAL: Judge, do you contemplate another  
7 status conference?

8 THE COURT: Sure. Well, let's see if I'm going to  
9 stay on the case. I guess that's the next status thing I'd  
10 want to do, because that would change things radically. And  
11 if somebody else -- as I said, if I have to recuse -- and I'm  
12 not trying to force anybody's hand because I think it may be  
13 outside of the ability of any of you to control what happens  
14 here, because those insurers will all go where they're going  
15 to go to retain representation, but I think it's mandatory  
16 recusal for me. Then I'm not sure at all that the MDL Panel  
17 would reassign the case to a Minnesota judge. I think it  
18 could go anywhere, but we'll see. I guess what I'll do is,  
19 after that period of time, if you want to request another  
20 status conference -- do we need something before  
21 certification?

22 MR. RAITER: It may make sense to do something in  
23 November or December.

24 MR. O'NEAL: I'd suggest December. Hopefully the  
25 expert depositions will be done or almost done and that might

1 be a good time.

2 THE COURT: If you agree on it, just call and we can  
3 get you in. That would be an hour-long deal and that won't be  
4 any problem squeezing it in in December.

5 Okay. Thank you.

6 (Proceedings concluded at 3:25 p.m.)

7 \* \* \* \* \*

8  
9 **C E R T I F I C A T E**

10  
11 I, **TIMOTHY J. WILLETTE**, Official Court Reporter  
12 for the United States District Court, do hereby  
13 certify that the foregoing pages are a true and  
14 accurate transcription of my shorthand notes,  
15 taken in the aforementioned matter, to the best  
16 of my skill and ability.  
17

18  
19  
20 **/s/ Timothy J. Willette**

21  
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